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TO: Examiner Ted M. Wang
FROM: Russell D. Culbertson
RE: Application Serial No. 09/640,802
OUR FILE NO.: 956.1055
DATE: September 30, 2005
PAGES INCLUDING COVER: 8
FAX NO.: (571)273-8300

MESSAGE:

RE: SERIAL NO. 09/640,802
GROUP ART UNIT 2634

ATTACHED:
APPLICANTS INITIATED INTERVIEW REQUEST FORM (PTOL-413A)
COPY OF MPEP 2173.05(c) RULE
COPY OF IN RE MOORE AND JANOSKI, 169 USPQ 236 (CCPA 1971)

PLEASE DELIVER TO
EXAMINER TED M. WANG

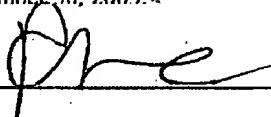
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PTOL-413A (09-04)
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 U.S. Patent and Trademark Office: U.S. DEPARTMENT OF COMMERCE

Applicant Initiated Interview Request Form

Application No.: 09/640,802 First Named Applicant: Tai Anh Cao
 Examiner: Ted M. Wang Art Unit: 2634 Status of Application: Pending

Tentative Participants:

(1) Examiner Ted M. Wang (2) SPE Stephen Chin
 (3) Russell D. Culbertson (4) _____

Proposed Date of Interview: October 4, 2005 Proposed Time: 10:00 AM (AM/PM)

Type of Interview Requested:

(1) ☒ Telephonic (2) ☐ Personal (3) ☐ Video Conference

Copy of MPEP 2173.05(e) Rule
 (1 Page) and Copy of Case In Re

Exhibit To Be Shown or Demonstrated: ☒ YES ☐ NO
 If yes, provide brief description: Moore and Janoski, 169 USPQ 236 (CCPA) (5 Pages).

Issues To Be Discussed

Issues (Rej., Obj., etc)	Claims/ Fig. #s	Prior Art	Discussed	Agreed	Not Agreed
(1) <u>112, ¶2 Rejection</u>	<u>5, 6, 11, 12, 15, and 16</u>	<u>None</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
(2) _____	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
(3) _____	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
(4) _____	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> Continuation Sheet Attached					

Brief Description of Arguments to be Presented:

The claims are not indefinite under 35 USC § 112, ¶ 2 in view of MPEP § 2173.05(e) and In re Moore and Janoski,
 169 USPQ 236.

An interview was conducted on the above-identified application on _____.

NOTE: This form should be completed by applicant and submitted to the examiner in advance of the interview (see MPEP § 713.01).

This application will not be delayed from issue because of applicant's failure to submit a written record of this interview. Therefore, applicant is advised to file a statement of the substance of this interview (37 CFR 1.133(b)) as soon as possible.

Applicant/Applicant's Representative Signature
Russell D. Culbertson

Examiner/SPE Signature

Typed/Printed Name of Applicant or Representative
32,124

Registration Number, if applicable

This collection of information is required by 37 CFR 1.133. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to take 21 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

2173.05(e) Lack of Antecedent Basis [R-1] - 2100 Patentability

Page 1 of 1

2173.05(e) Lack of Antecedent Basis [R-1]

A claim is indefinite when it contains words or phrases whose meaning is unclear. The lack of clarity could arise where a claim refers to "said lever" or "the lever," where the claim contains no earlier recitation or limitation of a lever and where it would be unclear as to what element the limitation was making reference. Similarly, if two different levers are recited earlier in the claim, the recitation of "said lever" in the same or subsequent claim would be unclear where it is uncertain which of the two levers was intended. A claim which refers to "said aluminum lever," but recites only "a lever" earlier in the claim, is indefinite because it is uncertain as to the lever to which reference is made. Obviously, however, the failure to provide explicit antecedent basis for terms does not always render a claim indefinite. If the scope of a claim would be reasonably ascertainable by those skilled in the art, then the claim is not indefinite. *Ex parte Porter*, 25 USPQ2d 1144, 1145 (Bd. Pat. App. & Inter. 1992) ("controlled stream of fluid" provided reasonable antecedent basis for "the controlled fluid"). Inherent components of elements recited have antecedent basis in the recitation of the components themselves. For example, the limitation "the outer surface of said sphere" would not require an antecedent recitation that the sphere has an outer surface. >See *Bose Corp. v. JBL, Inc.*, 274 F.3d 1354, 1359, 61 USPQ2d 1216, 1218-19 (Fed. Cir 2001) (holding that recitation of "an ellipse" provided antecedent basis for "an ellipse having a major diameter" because "[t]here can be no dispute that mathematically an inherent characteristic of an ellipse is a major diameter").<

clauses can have no meaning under the third paragraph of § 112," citing the following statement in *In re Jones*, 54 CCPA 1218, 373 F.2d 1007, 153 USPQ 77 (1967): "Appellant cannot positively claim what he has not disclosed and he has disclosed no means." This argument appears to raise the issue as to whether the language of the third paragraph of § 112 may be viewed as requiring the disclosure of at least one specific means in order to support a means clause in a claim.

We decline to speculate as to what specific grounds the board intended in affirming this rejection or regarding the possible positions the parties might take on the various issues we have indicated could be present here. Accordingly, we remand this case for clarification of this rejection and further consideration of all issues regarding these claims. Cf., *In re Frilette*, 57 CCPA 991, 423 F.2d 1397, 165 USPQ 259 (1970).

Summary

The decision of the Board of Appeals with regard to claims 1, 4, 5, 7, 8, 12, 15 and 16 is *affirmed*. The case, insofar as the rejection of the remaining claims is concerned, is *remanded*.

Court of Customs and Patent Appeals

In re MOORE AND JANOSKI

No. 8428

Decided Apr. 1, 1971

PATENTS

1. Claims — Indefinite — In general (§20.551)

Construction of specification and claims — By prior art (§22.20)

Construction of specification and claims — By specification and drawings — In general (§22.251)

Definiteness of language employed in claims must be analyzed — not in a vacuum, but always in light of teachings of prior art and of the particular application disclosure as it would be interpreted by one possessing ordinary level of skill in pertinent art; claims may appear indefinite when read in a vacuum, but may be definite upon reading of specification or prior art teachings; an otherwise definite claim in a vacuum may be un-

certain when read upon specification and prior art.

2. Claims — Specification must support (§20.85)

Specification — Sufficiency of disclosure (§62.7)

Once having determined that subject matter defined by claims is particular and definite, analysis turns to first paragraph of 35 U.S.C. 112 to determine whether scope of protection sought is supported by specification disclosure; inquiries include determining whether subject matter defined in claims is described in specification, whether specification disclosure as a whole is such as to enable one skilled in the art to make and use claimed invention, and whether best mode contemplated by inventor of carrying out that invention is set forth.

Particular patents—Alkyladamantanes

Moore and Janoski, Highly Fluorinated Alkyladamantanes, claims 1 to 7 of application allowed.

Appeal from Board of Appeals of the Patent Office.

Application for patent of Robert E. Moore and Edward J. Janoski, Serial No. 440,614, filed Mar. 17, 1965; Patent Office Group 120. From decision rejecting claims 1 to 7, applicants appeal. Reversed.

BARRY A. BISSON, Wilmington, Del., for appellants.

S. WM. COCHRAN (JOSEPH F. NAKAMURA of counsel) for Commissioner of Patents.

Before RICH, ALMOND, BALDWIN, and LANE, Associate Judges, and DURFEE, Judge, United States Court of Claims, sitting by designation.

BALDWIN, Judge.

The sole issue in this appeal is whether the Patent Office Board of Appeals was correct in affirming the rejection of claims 1-7 in appellants' application¹ as failing to comply with the requirements of 35 U.S.C. 112. Five other claims were allowed.

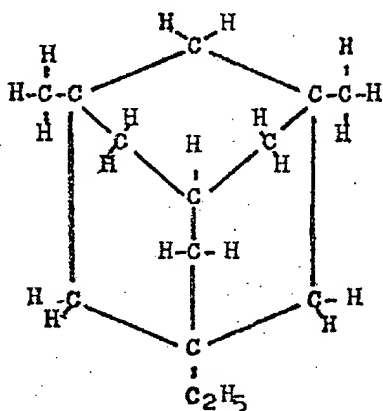
The Invention

The subject matter of the appealed claims involves products which are obtained when hydrocarbon compounds of the following nature are fluorinated:

¹Serial No. 440,614, filed March 17, 1965, for "Highly Fluorinated Alkyladamantanes."

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The two-dimensional drawing shown above is supposed to represent a highly complex, three-dimensional compound referred to as an alkyl adamantane. According to appellants' specification, the carbon atoms of the basic adamantane nucleus are "arranged in a completely symmetrical, strainless manner such that four of the carbon atoms occupy bridgehead positions." This arrangement, and the fact that dehydrogenation cannot occur because of the bridgehead carbon atoms, produces a "highly stable hydrocarbon." The specification goes on to teach that when "these alkyladamantanes are subjected to fluorinating conditions effective to result in a degree of fluorination which is at least 75% of that corresponding to perfluorination," there results a highly fluorinated product with some very desirable properties.

The rejected claims fall into two groups. Claims 1 and 2 make up the first group, of which claim 1 is illustrative:

1. As a composition of matter, a mixture of highly fluorinated alkyladamantanes prepared by fluorinating an alkyladamantane

selected from the group consisting of 1, 3-dimethyladamantane, 1, 3, 5-trimethyladamantane, 1-ethyladamantane, 1-ethyl-3-methyladamantane and 1-ethyl-3, 5-dimethyladamantane,

and in which the degree of fluorination is at least 75% of that corresponding to perfluorination of said alkyladamantane.

Claims 3-7 are directed to compositions formed from specific alkyladamantanes. Claim 3 is illustrative:

3. As a composition of matter, highly fluorinated 1-ethyladamantane containing at least 15 fluorine atoms per molecule.

The allowed claims are directed to per-

fluorinated compositions, i.e., wherein all available hydrogens are replaced by fluorine atoms. No references have been relied on.

The Rejection

It appears from the record that while appellants' claims were consistently rejected under 35 U.S.C. 112, the specific grounds for so rejecting were not fully articulated until the examiner's Answer to appellants' brief before the Board of Appeals. With respect to claims 1 and 2, the examiner there took the position that the recitation therein of "a mixture of highly fluorinated alkyladamantanes prepared by fluorinating an alkyladamantane" rendered those claims product-by-process claims. He went on to hold that, as such, the claims were indefinite since in the absence of a recitation of specific process limitations "it is not clear which products are produced" or "whether a given fluorination process will preferentially substitute the ring, chain or bridgehead carbon atoms".

As to claims 3-7, which employ the language "highly fluorinated" to modify the particular alkyladamantane recited, the examiner stated first that he was unsure "whether a regular generic product or product-by-process claim is intended." He then went on to indicate that if these claims were to be regarded as product-by-process claims he would hold them indefinite on the same grounds applied to claims 1 and 2. These grounds he later summarized as "there are insufficient process limitations to define the product produced by said process." If, on the other hand, the claims were intended to be "regular generic product" claims, the following alternative ground of rejection was set forth:

there is no evidence that any particular product within the scope of the claims can be prepared, at will nor is there any disclosure of a single species. Thus there is no support for a claim generic to all conceivable species when only certain mixtures can be prepared.

Again, in response to certain of appellants' arguments, the examiner later expanded on this reasoning as follows:

in order for the disclosure to properly support these claims it must be evident that all individual isomers covered can be prepared. The present record does not make this evident. Even assuming that random fluorination occurs, the genus is readable on compounds which are not randomly fluorinated, e.g. those which have no fluorine on the alkyl groups, with all of the fluorine on the rings and bridge-

head. Thus, it is clear that these unsymmetrically fluorinated products cannot be prepared by random fluorination, yet they are encompassed by the claims. [Emphasis quoted.]

It seems indisputable that the examiner's reasoning in support of the rejection before us, as finally articulated, set forth two separate grounds for rejection. The first was that *all* of the claims, when viewed as product-by-process claims, are lacking in definiteness as required by the *second* paragraph of 35 U.S.C. 112. The second, applicable only to claims 3-7 and clearly alternative rather than cumulative to the first ground, was that, if these claims were viewed as being drawn to generic product coverage, they would not be supported by an adequate enabling disclosure as required by the *first* paragraph of § 112.

The Board of Appeals found "no reversible error in the rejection of the claims under 35 U.S.C. 112." However, for whatever reasons they saw fit, the board chose only to treat the question of the claims' definiteness, stating:

We view the claims before us as drawn to incomplete and therefore indefinite product-by-process claims in the language "highly fluorinated alkyladamantanes prepared by * * *" (claims 1-2) and "highly fluorinated" (claims 3-7). It is our view that the omission from the claims of process parameters, requisite to yield the desired fluorinated alkyladamantanes, renders the claims indefinite. It is too well-known in the art to belabor, that fluorination reactions broadly would yield not only the desired fluorinated alkyladamantanes but also as presented, undesired fluorinated degradation products of the alkyladamantanes.

With respect to Claims 3 through 7, we find the additional infirmity that while the language of each of these claims seems to be directed to a single compound, Claims 3 through 7 cover, in fact, any one or a mixture of more than one compound. If generic coverage was intended, appropriate definite generic claim language was available and no need is seen for resort to ambiguous claim terminology.

Opinion

The solicitor has not aided us in resolving the status of the issues on appeal, stating at one point in his brief that "an issue before the Court" is the correctness of the holdings by the examiner and the board that the claims are indefinite, and later on in his

argument that the claims "are broader than the disclosure *and thereby* fail to particularly point out and distinctly claim the invention." (Emphasis added). In any event we perceive, in the proceedings leading up to this appeal, a definite lack of sensitivity to the specific language of 35 U.S.C. 112 and a resultant confusion of a number of issues which, procedurally at least, should have been articulated and treated separately.

For the sake of completeness we will treat the claims on appeal as if they were rejected under both the first and second paragraphs of § 112. Any analysis in this regard should begin with the determination of whether the claims satisfy the requirements of the second paragraph. It may appear awkward at first to consider the two paragraphs in inverse order but it should be realized that when the first paragraph speaks of "the invention", it can only be referring to that invention which the applicant wishes to have protected by the patent grant, i.e., the *claimed* invention. For this reason the claims must be analyzed first in order to determine exactly what subject matter they encompass. The subject matter there set out must be presumed, in the absence of evidence to the contrary, to be that "which the applicant regards as his invention."

[1] This first inquiry therefore is merely to determine whether the claims do, in fact, set out and circumscribe a particular area with a reasonable degree of precision and particularity. It is here where the definiteness of the language employed must be analyzed—not in a vacuum, but always in light of the teachings of the prior art and of the particular application disclosure as it would be interpreted by one possessing the ordinary level of skill in the pertinent art.²

[2] Once having determined that the subject matter defined by the claims is particular and definite, the analysis then turns to the first paragraph of section 112 to determine whether the scope of protection sought is supported and justified by the specification disclosure. This first paragraph analysis in itself contains several inquiries. Considering the language of the statute, it

² It is important here to understand that under this analysis claims which on first reading — in a vacuum, if you will — appear indefinite may upon a reading of the specification disclosure or prior art teachings become quite definite. It may be less obvious that this rule also applies in the reverse, making an otherwise definite claim take on an unreasonable degree of uncertainty. See *In re Cohn*, 58 CCPA ___, ___, F.2d ___, 169 USPQ 95 (1971), *In re Hammack*, 57 CCPA 1225, 427 F.2d 1378, 166 USPQ 204 (1970).

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should be evident that these inquiries include determining whether the subject matter defined in the claims is described in the specification, whether the specification disclosure as a whole is such as to enable one skilled in the art to make and use the claimed invention, and whether the best mode contemplated by the inventor of carrying out that invention is set forth.

Two of the first paragraph requirements indicated above, i.e., the "description of the invention" and the "best mode" requirements, are relatively simple to comply with and thus will ordinarily demand minimal concern on the part of the Patent Office. We recently have had occasion to discuss the first of these requirements. See *In re Di-Leone*, 58 CCPA —, 436 F.2d 1404, 168 USPQ 592 (1971), *In re Ahlbrecht*, 58 CCPA —, 435 F.2d 908, 168 USPQ 293 (1971), *In re Robins*, 57 CCPA 1321, 429 F.2d 452, 166 USPQ 552 (1970). As to the latter, see *In re Gay*, 50 CCPA 725, 309 F.2d 769, 135 USPQ 311 (1962). What is of maximum concern in any analysis of whether a particular claim is supported by the disclosure in an application is whether that disclosure contains sufficient teaching regarding the subject matter of the claims as to enable one skilled in the pertinent art to make and to use the claimed invention. These two requirements, "how to make" and "how to use" have sometimes been referred to in combination as the "enablement" requirement, but, in one form or another, have been the subject of extended discussion in this court of recent years. The relevant inquiry may be summed up as being whether the scope of enablement provided to one of ordinary skill in the art by the disclosure is such as to be commensurate with the scope of protection sought by the claims.

Applying now the analysis outlined above to the case before us, the position of the Board of Appeals regarding the definiteness of the claims before us can be justified only if it can be concluded that one of ordinary skill in this art, having appellants' disclosure and claims before him, would not be possessed of a reasonable degree of certainty as to the exact subject matter encompassed within the claims. We must conclude that the board's position cannot stand. We simply cannot understand why it is felt that process parameters are important here. Appellants clearly disclose that it is not the *type* of fluorination process which is important but the *fact* that the products are fluorinated and fluorinated to a specific minimum degree (spelled out by all the claims). When it was

questioned whether known fluorination processes would produce the same type of product, appellants submitted an affidavit by one Schneider, an expert in the field, stating the opinion that "alkyl adamantanes when fluorinated by any of such procedures to the extent of at least 75% of that corresponding to perfluorination will convert into substantially the same highly fluorinated products regardless of which fluorination procedure is used." In the absence of anything of substance to the contrary, we find this opinion conclusive. The board's further comment that fluorination processes also yield undesired degradation products would be pertinent to the issue of definiteness if it were true and if the word "fluorinated" had to be considered as a "product-by-process" limitation. The Schneider affidavit, however, not only rebuts the latter interpretation but also presents facts which appear to be inconsistent with the former assertion. In any event, since we have found that these claims are not product-by-process claims, such a contention, even if it were true would be irrelevant to the issue of what the claims define and whether they are definite since it is quite clear that appellants do not wish to claim these degradation products, if any, *but only* the highly fluorinated alkyl adamantanes which are not degraded.

Considering now any assertions that the claims are not supported by an adequate enabling disclosure and thus are unduly broad, we also find these to be not well taken. As appellants' disclosure makes clear and the Schneider affidavit confirms, when the recited alkyl adamantanes are fluorinated by known processes to a degree short of complete substitution of all hydrogen atoms, there occur mixtures of compounds randomly fluorinated to the specified degree. Of pertinence here is what we said in *In re Steinhauer*, 56 CCPA 1093, 410 F.2d 411, 161 USPQ 595, 599 (1969):

What results from these procedures is not pure compounds but mixtures of compounds. That is what appellants want, it is what they get, and it is what they claim. Appellants are not claiming *any* specific compound. To demand of them that they shall turn their investigations in another direction and carry on an undetermined amount of further research to determine just *where* all the substituents are positioned on each ring in *each* compound in each mixture of each working example in their specification seems to us beyond the requirements of the law.

240

In re Borregard

169 USPQ

The decision of the Board of Appeals is reversed.

Court of Customs and Patent Appeals

In re BORREGARD

No. 8489

Decided Apr. 1, 1971

PATENTS

Particular patents—Transfer Sheet

Borregard, Dry Transfer Sheet and Method, claims 24 to 27 of application refused.

Appeal from Board of Appeals of the Patent Office.

Application for patent of Ernst Borregard, Serial No. 300,743, filed Aug. 8, 1963; Patent Office Group 162. From decision rejecting claims 24 to 27, applicant appeals. Affirmed.

DONALD R. DUNNER and LANE, AITKEN, DUNNER & ZIEMS (RONALD P. KANANEN of counsel) all of Washington, D. C., for appellant.

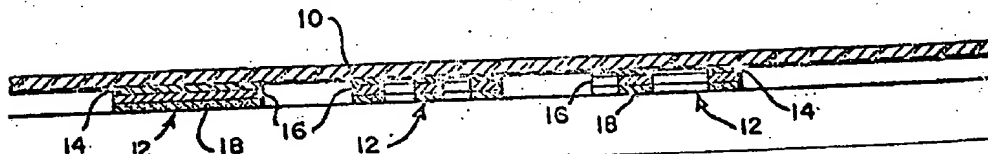
S. WM. COCHRAN (FRED E. MCKELVEY of counsel) for Commissioner of Patents.

Before RICH, ALMOND, BALDWIN, and LANE, Associate Judges, and RE, Judge United States Customs Court, sitting by designation.

ALMOND, Judge.

This is an appeal from the decision of the Patent Office Board of Appeals affirming the rejection of claims 24-27 of appellant's application entitled "Dry Transfer Sheet and Method."¹ No claims have been allowed.

The invention relates to a dry transfer sheet having a plurality of discrete characters or indicia spaced apart from one another in order to enable independent and selective transfer of the individual characters. The elements of the dry transfer sheet are shown in Fig. 2:



A light transmissive carrier sheet (10) supports a plurality of discrete reverse-printed characters (12) spaced apart from one another. In Fig. 2 the characters are composed of three layers. The first layer is a release layer (14); the second is an opaque film (16); and the third is a nonwaxy substantially nontacky pressure-sensitive adhesive (18). Alternatively, the opaque pigment may be incorporated into the release layer or into the adhesive, in which case a separate opaque film (16) is unnecessary. All layers of the characters may be silk screened onto the carrier, and they are to be in substantial registration while the remainder of the carrier sheet not covered by characters remains uncoated. During use, the individual characters are transferred by positioning the transfer sheet over the intended surface, with the adhesive layer adjacent said surface, and then rubbing against the front surface of the carrier sheet over the respective characters.

A single independent claim is on appeal:

24. A dry transfer sheet of the type which has a plurality of characters thereon and which is used by placing the sheet over

a layout, aligning a desired character with a specific location on the layout, then rubbing the sheet over the desired characters to transfer that character only to the layout without disturbing the remainder of the characters on the sheet, which comprises:

- (a) a light transmissive carrier sheet;
- (b) a plurality of discrete characters spaced apart from one another and adhered to the rear surface of said sheet, each character being capable of independent transfer to a layout from said sheet and each character comprising an opaque printed film member having
 - i. a layer of a release agent immediately against the said rear surface, and
 - ii. a layer of non-waxy substantially nontacky adhesive covering said layer of release agent and adapted to be engaged against the layout when the character is transferred;
- (c) said printed film member having said layers in substantial registration and

¹ Serial No. 300,743 filed August 8, 1963.

169 USPQ

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